ORIGINAL

No. _____ (3)

94-5707

In The
Supreme Court of the United States
October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Whether the "knock and announce" rule of the common law is constitutionally mandated under the Fourth Amendment.

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STATE OF ARKANSAS,

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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

Petitioner, Sharlene Wilson, petitions the Court for a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas.

OPINION BELOW

The opinion of the Arkansas Supreme Court of July 11, 1994 is not yet reported, but it will be in 317 Ark. 548, ___ S.W.2d ___. It is reprinted in the Appendix to this Petition.

JURISDICTION

The Arkansas Supreme Court decided this case on July 11, 1994. This petition is filed within ninety days of that date and is thus timely. S. Ct. Rule 13.1.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, ...

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law; . . . .

STATEMENT OF THE CASE

Petitioner was tried before a jury and convicted of the felonies of delivery of marijuana, delivery of methamphetamine, and possession of drug paraphernalia and misdemeanor possession of marijuana. She was acquitted of delivery of methamphetamine which depended solely on the testimony of the informant and possession of methamphetamine with intent to deliver which the officers alleged came from her purse during the execution of the search warrant at issue here. She was sentenced by the jury to a total of 31 years imprisonment in the Arkansas Department of Correction on the felonies and one year imprisonment

in the county jail on the misdemeanor. She was also fined $11,000.[1] The issue in this Petition for Writ of Certiorari involves the search of her house without prior announcemment, and, thus, only the fine and the year in the county jail.

The testimony against her came from an informant cooperating to aid herself and her husband, the officer controlling the informant, and officers who executed the search warrant on her house. The affiant officer on the search warrant alleged that the confidential informant made buys of marijuana and methamphetamine from petitioner at her house. The same officer watched petitioner leave her house to meet with the informant for a controlled buy, which he also observed.

Four officers executed the search warrant at petitioner's home on December 31, 1992. Petitioner, her husband, and two friends were inside. One of the officers at the front of the raiding party, Henry Efird, heard no announcement; the officers just walked in. Another officer, Roger Walls, testified that one of them stated what they were there to search as they walked in, not before. At any rate, it is clear that petitioner and the others

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[1] Petitioner was charged with six counts in three case numbers, and the result was as follows:

Guilty on delivery of marijuana (a felony) on November 22, 1992 to informant, 6 years;
Guilty on delivery of methamphetamine (a felony) on November 23, 1992 to informant, 25 years;
Not guilty of delivery of methamphetamine (a felony) on December 30, 1992 to informant;
Guilty on possession of drug paraphernalia (a felony) on December 31, 1992 from the search, $10,000 fine;
Guilty of possession of marijuana (a misdemeanor) on December 31, 1992 from the search, one year and $1,000 fine; and
Not guilty of possession of methamphetamine (a felony) on December 31, 1992 from the search.

were given no opportunity to surrender their privacy to the officers.

On appeal to the Arkansas Supreme Court, the court held that the officers complied with Rule 13.3(e) of the Arkansas Rules of Criminal Procedure in conducting the search without prior announcement, and that the Fourth Amendment does not contain a "knock and announce" requirement (petitioner's comments are added by footnotes in brackets):

> . . . Ms. Wilson submits the officers executing the search failed to knock and announce their identity before entering the residence. The testimony indicated that the officers entered the home while they were identifying themselves.[2] Ms. Wilson relies upon *Miller v. United States*, 357 U.S. 301 (1958), as the sole authority[3] for her argument. . . . However, *Miller* involved a statute, 18 U.S.C. § 3109, which specified that a law enforcement officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose," he is denied admittance. The Fourth Amendment was not mentioned.
>
> There is no authority for Ms. Wilson's theory that the knock and announce principle is required for the Fourth Amendment.[4] Furthermore, Ark. R. Crim. P. 13.3 outlines the procedure to be followed in the execution of a search warrant, and provides in part:
>
> > (e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.
>
> Rule 13.3 does not contain a "knock and announce" rule. *See also Dodson v. State*, 4 Ark.App. 1, 626 S.W.2d 624 (1982) (Glaze, J., concurring), *cert. denied*, 457 U.S. 1136 (1982).

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[2] As noted, one officer testified that another said that they had a search warrant as they were entering. Another officer testified that he heard nothing.

[3] It is *not* the "sole authority" petition relied on. *See* her Appellant's Brief at 52-53 citing *Miller*, *Ker*, and *Sabbath*, all *infra*.

[4] That is the reason we are here.

Wilson v. State, CR94-160, slip op. at 7-8 (bracketed material added), App. 7-8.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE "KNOCK AND ANNOUNCE" RULE OF THE COMMON LAW IS A REQUIREMENT OF THE FOURTH AMENDMENT.

A.

The "knock and announce" requirement derives from the common law,[5] and it was first articulated four centuries ago in *Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (1603). The purpose underlying the rule back then; *i.e.*, giving the occupant or homeowner the opportunity to surrender his or her privacy to the law to avoid a great potential for violence; is just as valid today, if not more so, given the fact there are hundreds of millions of firearms in American homes and the propensity and regular need for narcotics officers to raid houses in plainclothes without announcing.

This Court has never directly held that the "knock and announce" rule is a part of the Fourth Amendment, and it is time to do so. There are valid and important exceptions to the "knock and announce" requirement which, even if petitioner's prevails, would still be the

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[5] *See generally* Blakely, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U.PA.L.REV. 499 (1964); Note, *Announcement* in Police Entries, 80 YALE L.J. 139 (1970); Sonnenreich & Ebner, *No-Knock and Nonsense: An Alleged Constitutional Problem*, 44 ST. JOHN'S L.REV. 626 (1970).

law.[6]

B.

In *Ker v. California*, 374 U.S. 23, 47-49 (1963), Justice Brennan, concurring for himself and three others, found that the common law requirement of announcement is embodied in the Fourth Amendment.

> It was firmly established long before the adoption of the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entries. "[T]he Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won, that finds another expression in the maxim 'every man's home is his castle.'" Fraenkel, Concerning Searches and Seizures, 34 Harv.L.Rev. 361, 365 (1921); *Frank v. Maryland*, 359 U.S. 360, 376-382 (dissenting opinion). As early as *Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (1603), it was declared that "[i]n all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* * * *.' (Emphasis supplied.) Over a century later the leading commentators upon the English criminal law affirmed the continuing vitality of that principle. 1 Hale, Pleas of the Crown (1736), 583; see also 2 Hawkins, Pleas of the Crown (6th ed. 1787), c. 14, § 1; Foster, Crown Law (1762), 320-321. Perhaps its most emphatic confirmation was supplied only 35 years before the ratification of the Bill of Rights. In *Curtis' Case*, Fost. 135, 168 Eng.Rep. 67, decided in 1756, the defendant, on trial for the murder of a Crown officer who was attempting an entry to serve an arrest warrant, pleaded that because the officer had failed adequately to announce himself and his mission before breaking the doors, forceful resistance to his entry was justified and the killing was therefore justifiable homicide. In recognizing the defense the court repeated the principle that "peace-officers, having a legal warrant to

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[6] *Miller*, *Ker*, and *Sabbath* all involved exceptions to the rule.

See, e.g., 2 W. LAFAVE, SEARCH AND SEIZURE § 4.8 (2d ed.1987); 2 J. HALL, SEARCH AND SEIZURE §§ 44:2-44:13 (2d ed.1993); Annot., *What constitutes violation of 18 USCS § 3109 requiring federal officer to give notice of his authority and purpose prior to breaking open door or window or other part of house to execute search warrant*, 21 A.L.R.Fed. 820 (1974); Annot., *What constitutes compliance with knock-and-announce rule in search of premises—state cases*, 70 A.L.R.3d 217 (1976).

arrest for a breach of the peace, may break open doors, *after having demanded admittance and given due notice of their warrant";* the court continued that "no precise form of words is required in a case of this kind" because "[i]t is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority * * *." Fost., at 136-137, 168 Eng.Rep., at 68. (Emphasis supplied.) The principle was again confirmed not long after the Fourth Amendment became part of our Constitution. ABBOTT, C.J., said in *Launock v. Brown,* 2 B. & Ald. 592, 593-594, 106 Eng.Rep. 482, 483 (1819):

> "* * * I am clearly of opinion that, in the case of a misdemeanour, such previous demand is requisite * * *. It is reasonable that the law should be so; for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost."

The protections of individual freedom carried into the Fourth Amendment, *Boyd v. United States,* 116 U.S. 616, 630, undoubtedly included this firmly established requirement of an announcement by police officers of purpose and authority before breaking into an individual's home. The requirement is no mere procedural nicety or formality attendant upon the service of a warrant. Decisions in both the federal and state courts have recognized, as did the English courts, that the requirement is of the essence of the substantive protections which safeguard individual liberty. (emphasis in original)

Five members of Court, however, did not reach the question of whether the "knock and announce" rule was a Fourth Amendment requirement.[7]

C.

In two other cases, the Court applied the "knock and announce" rule, but it did not hold that the rule was a part of the Fourth Amendment. Before *Ker,* in *Miller v. United States,* 357 U.S. 301, 307-09 (1957), the Court construed the federal knock and announce

[7] *See also Miller v. United States, infra,* 357 U.S. at 306-09 (discussing common law history in construing the federal knock and announce statute).

statute, 18 U.S.C. § 3109, and held that it was a codification of the common law. After *Ker,* in *Sabbath v. United States,* 391 U.S. 585, 591 n.8 (1968), the Court held that there were exceptions to the "knock and announce" rule.

> Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, see *Ker v. California, supra,* 374 U.S. at 47 (opinion of BRENNAN, J.), and there is little reason why those limited exceptions might not also apply to § 3109, since these existed at common law, of which the statute is a codification.

By *Sabbath,* it seemed that the "knock and announce" rule had almost gained constitutional status. *See* Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception,* 93 COLUM.L.REV. 685, 685 (1993) (*Ker* constitutionalized "knock and announce"). Nevertheless, the Court has never so held.

D.

The common law at the time of the adoption of the Fourth Amendment has long provided significant, if not decisive guidance, as to what the Framers of the Fourth Amendment thought was a reasonable search, particularly involving the sanctity of the home. *Payton v. New York,* 445 U.S. 573, 591 & n.33 (1980); *Steagald v. United States,* 451 U.S. 204, 217 (1981) ("The common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."). *See also Tennessee v. Garner,* 471 U.S. 1, 13 (1985) ("It is true that this Court has often looked to the common law in evaluating reasonableness, for Fourth Amendment purposes, of police activity."). *Semayne's Case* was relied on by the Court in two if its "knock and announce" cases; *Ker, supra,* and *Miller,* 357 U.S. at 308; and two cases

involving searches of the home; *Payton,* 445 U.S. at 592-93; *Steagald,* 451 U.S. at 217.

But, "[t]here are important differences between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the fourth amendment in light of contemporary norms and conditions." *Payton, supra,* 445 U.S. at 591 n.33. *Accord: Steagald,* 451 U.S. at 217 n.10 (common law rules developed in simpler times); *Garner, supra* (same). In the area of curtilage, for example, the common law was virtually controlling; *California v. Ciraolo,* 476 U.S. 207, 212 (1986); *United States v. Dunn,* 480 U.S. 294, 300 (1987); but trespass has been the only real recognized exception to finding the common law controlling. *Hester v United States,* 265 U.S. 57 (1924); *Oliver v. United States,* 466 U.S. 170, 180 (1984).

Some members of the Court have looked to the common law as the touchstone of Fourth Amendment "reasonableness." *See, e.g., California v. Acevedo,* 111 S.Ct. 1982, 1993 (1991) (SCALIA, J., concurring in the judgment); *County of Riverside v. McLaughlin,* 111 S.Ct. 1661, 1672 (1991) (SCALIA, J., dissenting); *California v. Hodari D.,* 111 S.Ct. 1547, 1553 (1991) (STEVENS & MARSHALL, JJ., dissenting).

E.

The "knock and announce" rule is one of the oldest in the law, having gained its first judicial recognition nearly four hundred years ago and 188 years before adoption of the Fourth Amendment. The Court should grant certiorari to decide once and for all whether it is a part of the Fourth Amendment,[8] particularly in light of the overwhelming number of

[8] The exceptions to the "knock and announce" requirement already recognized in the cases would still be exceptions under the Fourth Amendment.

jurisdictions holding that it is.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATES ON WHETHER THE "KNOCK AND ANNOUNCE" RULE IS A REQUIREMENT OF THE FOURTH AMENDMENT.

While the Court has not directly held that the common law "knock and announce" requirement is a part of the Fourth Amendment, numerous federal[9] and state[10] courts have

[9] *See, e.g., Rivera v. United States,* 928 F.2d 592 (2d Cir.1991); *United States v. Nolan,* 718 F.2d 589, 600-02 (3d Cir.1983); *United States v. Mueller,* 902 F.2d 336, 343-44 n.6 (5th Cir.1990); *United States v. Sagaribaz,* 982 F.2d 906 (5th Cir.1993), *cert.denied,* 114 S.Ct. 160; *United States v. Francis,* 646 F.2d 251, 258 (6th Cir.), *cert. denied,* 454 U.S. 1082 (1981); *United States v. Agrusa,* 541 F.2d 690, 697 (8th Cir.1976), *cert. denied,* 429 U.S. 1045; *United States v. Valenzuela,* 596 F.2d 824, 830 (9th Cir.), *cert. denied,* 441 U.S. 965; *United States v. Baker,* 638 F.2d 198, 202 (10th Cir.1980).

[10] *See, e.g.: State v. Wright,* 131 Ariz. 578, 643 P.2d 23, 25 (App.1982); *People v. Jacobs,* 43 Cal.3d 472, 233 Cal.Rptr. 323, 729 P.2d 757, 764 (1987); *People v. Gonzalez,* 211 Cal.App.3d 1043, 259 Cal.Rptr. 846, 848 (1989); *Marvel v. State,* 290 A.2d 641 (Del.1972); *Gregory v. State,* 616 A.2d 1198, 1200 (Del.1992); *Benefield v. State,* 160 So.2d 706, 710 (Fla.1964); *see Napoli v. State,* 596 So.2d 782, 783-84 (Fla.App.1992); *State v. Dusch,* 289 N.E.2d 515, 517 (Ind.1972); *State v. Brown,* 253 N.W.2d 601, 602 (Iowa 1977); *State v. Cohrs,* 484 N.W.2d 223, 225 (Iowa 1992); *State v. Tyler,* 251 Kan. 616, 840 P.2d 413, 428 (1992); *People v. Polidor,* 190 Mich.App. 673, 476 N.W.2d 482, 484 (1991), *app. denied,* 439 Mich. 918, 479 N.W.2d 636, *cert. denied,* 113 S.Ct. 298 (1992); *State v. Pierson,* 238 Neb. 872, 472 N.W.2d 898, 901 (1991) (apparently so holds); *State v. Sanchez,* 88 N.M. 402, 540 P.2d 1291, 1292 (1975); *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (App.1974); *State v. Williams,* 114 N.M. 485, 840 P.2d 1251, 1253-55 (App.1992); *State v. Sakellson,* 379 N.W.2d 779, 783 (N.D.1985); *State v. Valentine,* 264 Or. 54, 504 P.2d 84, 85 (1972); *State v. Gassner,* 6 Or.App. 452, 485 P.2d 822, 824 (1971); *State v. Bost,* 114 Or.App. 519, 837 P.2d 536, 539 (1992), *rev'd on other grounds,* 317 Ore. 538, 857 P.2d 132, 136 (1993) (exigency shown); *Commonwealth v. Newman,* 429 Pa. 441, 240 A.2d 795, 599 (1968); *Commonwealth v. Chambers,* 385 Pa.Super. 605, 561 A.2d 1257 (1989); *Commonwealth v. Bull,* 426 Pa.

held or assumed that the "knock and announce" requirement is a part of the Fourth Amendment's requirement of "reasonableness" of searches. Nearly every state has a statute authorizing use of force to enter premises after announcement to search or arrest.[11]

Super. 67, 618 A.2d 1019 (1993); *State v. Carufel,* 112 R.I. 664, 413 A.2d 144, 147 (1974); *Keith v. State,* 542 S.W.2d 839, 841 (Tenn.Cr.App.1976); *State v. Garcia-Hernandez,* 67 Wash.App. 492, 837 P.2d 624, 627 (1992); *State v. Coyle,* 95 Wash.2d 1, 621 P.2d 1256, 1261-62 (1980); *State v. Stevens,* 181 Wis.2d 410, 511 N.W.2d 591, 594-95 (1994); *State v. Cleveland,* 114 Wis.2d 213, 338 N.W.2d 500 (App.), *aff'd,* 118 Wis.2d 615, 368 N.W.2d 512 (1983).

[11] Virtually all the state statutes and rules read in the common law rule if the common law rule is not written into the statute:

Alabama: Ala.Code § 15-5-9 (notice)
Alaska: Alaska Stat. § 12.25.040 (breaking permitted; notice not mentioned)
Arizona: Ariz.Rev.Stat. § 13-3916 (notice)
Arkansas: Ark.R.Crim.P. 13.3(e) (breaking permitted; notice not mentioned)
California: Cal.Penal Code § 1531 (notice and breaking)
Colorado: Colo.Rev.Stat. § 16-3-304(b) (such force as is necessary)
Connecticut: none
Delaware: none
D.C.: D.C. Code § 23-524(b) (notice and breaking permitted)
Florida: Fla.Stat.Ann. § 933.09 (notice and breaking permitted)
Georgia: Ga.Code Ann. § 17-5-27 (notice and reasonable force permitted)
Hawaii: Haw.Rev.Stat. § 803-37 (notice and breaking permitted)
Idaho: Idaho Code § 19-4409 (notice and breaking permitted)
Illinois: 725 I.L.C.S. § 5/108-8 (force; no knock provision)
Indiana: Ind.Stat.Ann. § 35-33-5-7 (notice and breaking permitted)
Iowa: Iowa Code Ann. § 808.6 (notice and breaking permitted)
Kansas: Kan.Stat.Ann. § 22-2508 (notice and reasonable force permitted)
Kentucky: Ky.Rev.Stat. § 70.078 (notice and breaking permitted)
Louisiana: La.Stat.Ann., C.Cr.P. Art. 164, 224 (notice and breaking permitted)
Maryland: none
Massachusetts: none
Michigan: Mich.C.Laws Ann. § 780.656 (notice and breaking permitted)
Mississippi: Miss.Code Ann. § 41-29-157(c) (notice and breaking permitted; no knock in drugs cases permitted)
Missouri: V.A.M.S. § 544.200 (notice and breaking permitted)
Nebraska: Rev.Stat.Neb. § 29-411 (notice and breaking permitted)
Nevada: N.R.S. § 179.055(1) (notice and breaking permitted)

A small minority of courts have held that the "knock and announce" requirement is not constitutionally compelled,[12] and, along that same line, others held that a bad enough violation of the requirement would violate the Fourth Amendment's reasonableness require-

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New Hampshire: none
New Jersey: N.J.S.A. § 33:1-58 (intoxicating liquor only on statute)
New Mexico: none
New York: N.Y. Crim.Pro.L. § 690.50 (notice and breaking permitted)
North Carolina: G.S.N.C. § 15A-251 (notice and breaking permitted)
North Dakota: N.D.C.C. § 29-29-08 (notice and breaking permitted)
Ohio: Ohio Rev.Code §§ 2935.12 (notice and breaking permitted) & 2933.231 (no knock permitted)
Oklahoma: 22 Okla.Stat.Ann. § 1228 (notice and breaking permitted)
Oregon: Or.Rev.Stat.Ann. § 133.575(2) (notice and breaking permitted)
Pennsylvania: Pa.R.Crim.Pro. 2007 (notice and breaking permitted)
Puerto Rico: 34 L.P.R.A. § 1819 (notice and breaking permitted)
Rhode Island: G.L.R.I. § 12-7-8 (reasonable force)
South Carolina: none
South Dakota: S.D.C.C. §§ 23A-35-8 (notice and breaking permitted) & 23A-35-9 (no knock permitted)
Tennessee: Tenn.Code Ann. § 40-7-107 (notice and breaking permitted)
Texas: Vernon's Tex. Stat. Ann., C.Cr.P. Art. 18.06(b) (notice and breaking permitted)
Utah: Utah Code Ann. § 77-23-210 (notice and breaking permitted; no knock permitted)
Vermont: none
Virgin Islands: 5 V.I.C. § 3904 (notice and breaking permitted)
Washington: R.C.W.A. § 10.31.040 (notice and breaking permitted)
West Virginia: W.Va.C. § 62-1A-5 (notice and breaking permitted)
Wisconsin: Wis.Stat.Ann. § 968.14 (notice and breaking permitted)
Wyoming: Wyo.Stat.Ann. § 7-7-104 (notice and breaking permitted)

[12] *See, e.g.: Wilson v. State,* CR94-160 (July 11, 1994), slip op. at 7-8; *People v. Saechao,* 129 Ill.2d 522, 136 Ill.Dec. 59, 544 N.E.2d 745, 749 (1989); *Commonwealth v. Cundriff,* 382 Mass. 137, 415 N.E.2d 172 (1980), *cert. denied,* 451 U.S. 973 (1981); *Commonwealth v. Scalise,* 387 Mass. 413, 439 N.E.2d 818 (1982); *Commonwealth v. Sepulveda,* 406 Mass. 180, 546 N.E.2d 879, 880 (1989); *Commonwealth v. Goggin,* 412 Mass. 200, 587 N.E.2d 785 (1992); *Heaton v. Commonwealth,* 215 Va. 137, 207 S.E.2d 829, 831 (1974) (*but see Wynne v. Commonwealth,* 427 S.E.2d 228 (Va.App. 1993)).

ment even if not compelled.[13] Some courts have reserved the constitutional question.[14]

The Court should grant certiorari to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 26, 1994

[13] *State v. Jones*, 124 N.H. 515, 503 A.2d 802, 804-06 (1985); *State v. Thompson*, 571 A.2d 266, 268-69 (N.H.1990).

[14] *State v. Thurman*, 846 P.2d 1256, 1262 (Utah 1993).

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SUPREME COURT OF ARKANSAS

No. CR94-160

Opinion Delivered JUL 11 1994

SHARLENE WILSON, APPELLANT, V. STATE OF ARKANSAS, APPELLEE,	APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT, NO. CR93-1-1, CR93-63-1 HON. JOHN W. COLE, JUDGE, AFFIRMED.

STEELE HAYS, Associate Justice

Appellant Sharlene Wilson was tried and convicted of possession of marijuana, delivery of marijuana, delivery of methamphetamine, and possession of drug paraphernalia. The jury sentenced her to a total of thirty-one years imprisonment in the Arkansas Department of Correction and one year imprisonment in the Hot Spring County Jail. She was fined a total of $11,000. On appeal Ms. Wilson charges the trial court with two errors: (1) denying her motion to dismiss based upon outrageous police conduct and (2) denying her motion to suppress the fruits of the search of her residence. Finding no error, we affirm the judgment of conviction.

Ms. Wilson was incarcerated in the Malvern City Jail awaiting trial. She was represented by counsel at the time. Officers with the Seventh Judicial District Drug Task Force wired an informant and sent her into the appellant's cell. After a brief conversation with the informant, Ms. Wilson discovered the transmitter. At no

time did Ms. Wilson incriminate herself or supply any information pertinent to her case.

Officer Roger Walls testified he had information that Bryson Jacobs, who had been living with Ms. Wilson, was planning an escape from the Hot Spring County Jail. According to Walls's testimony, the informant was sent into the cell to uncover the plans for escape. However, other officers testified to a dual purpose in the use of the informant: to obtain information which could be used against Ms. Wilson and to obtain information regarding the escape.

The appellant moved to dismiss the charges against her based upon a Sixth Amendment violation. Ms. Morrison contends the outrageous conduct of the officers warranted the extreme remedy of dismissal of the charges. Because we find that no prejudice occurred, we will assume, arguendo, that the Sixth Amendment was violated under the circumstances of this case.

In *United States v. Morrison*, 449 U.S. 361 (1981), the United States Supreme Court held that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the [Sixth Amendment] violation may have been deliberate." (Emphasis supplied.) Factually, Ms. Morrison had retained counsel to represent her in the pending criminal proceedings. Thereafter, two agents of the Drug Enforcement Agency, aware that she had been indicted and had retained counsel, sought to obtain her cooperation in a related investigation. They met with her without the knowledge or permission of her counsel. The agents told her it would be to her advantage if she cooperated

but she would face a stiff jail term if she did not. At no time did Ms. Morrison incriminate herself or supply any information pertinent to her case. Ms. Morrison moved to dismiss the indictment. In determining that dismissal of the indictment was not appropriate, the Court noted:

> [W]hen before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted. In addition, certain violations of the right to counsel may be disregarded as harmless error. [Citations omitted.]

Similarly, in *Massiah v. United States*, 377 U.S. 201 (1964), the Court held that where a Sixth Amendment violation has occurred the defendant's own incriminating statements could not constitutionally be used by the prosecution as evidence against him at his trial. Once again, Mr. Massiah had retained counsel. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. At Mr. Massiah's trial these incriminating statements were brought before the jury. The Court held that Mr. Massiah was denied the basic protections guaranteed by the Sixth Amendment when such evidence was used against him at his trial.

Ms. Wilson acknowledges the holdings in *Morrison* and *Massiah*; however, she submits we should reverse and dismiss under Ark. Const. Art. 2, § 8 and § 10. We find the cited provisions of the Arkansas Constitution do not provide for such relief. Further, the appellant fails to allege she suffered any prejudice as a result of the surreptitious actions. We have repeatedly held that an appellant must show prejudice, because this Court will not reverse for harmless error. *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992).

It is troubling to find in this record a clear implication that public officials charged with enforcement of law would, in concert, pursue a course calculated to circumvent fundamental provisions thereof. Not the least of our concerns is the fact that had the plan succeeded, the prosecution of these offenses would have been seriously jeopardized.

Turning to the second point, officers with the Saline County Sheriff's Office and the Seventh Judicial District Drug Task Force executed a search warrant at the home of the appellant. Officer Henry Efird's affidavit in support of the warrant recited that a confidential informant had made purchases of marijuana and methamphetamine from the appellant at the residence. Further, Officer Efird observed Ms. Wilson leave her residence and proceed to a meeting with the informant. At that time, the officer observed a transaction between Ms. Wilson and the informant.

During the search of Ms. Wilson's home, the officers discovered an amount of marijuana, an amount of methamphetamine,

and drug paraphernalia. The appellant moved to suppress the evidence seized in the search on the ground that the affidavit contained omissions of fact which were material to the finding of probable cause and on the ground that the officers failed to "knock and announce."

At the suppression hearing, Ms. Wilson contended three exculpatory items were omitted from the affidavit. First, the affidavit failed to disclose that the informant and her husband had been arrested and that she had agreed to cooperate in order to help herself and her husband. Second, the affidavit failed to disclose that Ms. Wilson declined to sell drugs to the informant on prior occasions. Third, the affidavit failed to disclose that when a buy allegedly occurred, the drugs did not come directly from Ms. Wilson's home. Ms. Wilson contends that had these omissions been included in the affidavit it would have undermined the informant's credibility to the point that probable cause would be lacking. The trial court denied Ms. Wilson's motion to suppress the evidence.

In reviewing a trial court's ruling on a motion to suppress, we consider the totality of the circumstances to determine if the trial court's decision was clearly against the preponderance of the evidence. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993). We consider the facts in the light most favorable to the appellee. *Id.* Under *Franks v. Delaware*, 438 U.S. 154 (1978), a warrant should be invalidated if a defendant shows by a preponderance of the evidence that: (1) the affidavit contained a false statement which was made knowingly, intentionally, or recklessly by the

affiant and (2) the false statement was necessary to a finding of probable cause.

In *Pyle*, supra, we concluded that even with omissions there must be a knowing intent to deceive, or a reckless disregard of truth. Further, we found the omissions must involve material circumstances which contradict or dispel the incriminating factors in the affidavit. As to the informant's motive for cooperation in the instant case, such an omission simply does not contradict or dispel the incriminating factors in the affidavit. Also, Officer Efird independently corroborated most of the information supplied by the informant which constitutes "particular facts bearing on the informant's reliability." *See* Ark. R. Crim. P. 13.1. Second, we have specifically recognized that the omission of refusals to sell drugs on other occasions does not amount to deception by negation. *Pyle*, supra. Finally, applying the *Pyle* standard, where Ms. Wilson obtained the drugs is immaterial to the incriminating factors in the affidavit.

Even if the omissions were material, probable cause is present in the warrant. Officer Efird stated that he followed Ms. Wilson from her house to a meeting with the informant. Officer Efird observed a drug transaction. Thus, the credibility of the informant is not an issue regarding probable cause. Further, as there was probable cause to believe Ms. Wilson possessed drugs at her residence, where she obtained or manufactured the drugs is irrelevant.

As an additional ground for suppression of the fruits of the

search, Ms. Wilson submits the officers executing the search failed to knock and announce their identity before entering the residence. The testimony indicated that the officers entered the home while they were identifying themselves. Ms. Wilson relies upon *Miller v. United States*, 357 U.S. 301 (1958), as the sole authority for her argument. The appellant contends, based upon *Miller*, that the Fourth Amendment requires officers to knock and announce prior to entering the residence. However, *Miller* involved a statute, 18 U.S.C. § 3109, which specified that a law enforcement officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose," he is denied admittance. The Fourth Amendment was not mentioned.

There is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment. Furthermore, Ark. R. Crim. P. 13.3 outlines the procedure to be followed in the execution of a search warrant, and provides in part:

> (e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.

Rule 13.3 does not contain a "knock and announce" rule. *See also Dodson v. State*, 4 Ark. App. 1, 626 S.W.2d 624 (1982) (Glaze, J.,

concurring), *cert. denied*, 457 U.S. 1136 (1982).

In sum, we find no error and affirm the judgment of conviction.